agency to which section 148.6 applies serves *solely* to prompt the mandatory investigation and reporting. The complaint, itself, is not evidence or material to the misconduct investigation, itself. It is simply the alarm or trigger. Under section 148.6, no one is subject to penalty for making a false statement during the course of the investigation. Thus, anyone, including the complainant, who makes a false statement in the course of the investigation *critical* of a peace officer is treated no differently from a witness who makes a false statement *supportive* of an officer. It is a false factual premise to compare the initial allegation of misconduct, which has no materiality to the investigation other than to trigger it, with the statements made by the complainant, the officer and other witnesses in the course of the investigation, itself, which do matter. This is the flaw in the Ninth Circuit's analysis and once exposed, its decision crumbles.

The Ninth Circuit erred as a matter of law in finding that section 148.6 discriminates on the basis of the speaker's viewpoint within the contemplation of the First Amendment. As this Court has held, the test whether a regulation discriminates on the basis of viewpoint is whether "the specific motivating ideology or opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. The rationale behind section 148.6 is to prevent wasteful and harmful misconduct investigations premised on a false report. The only motivating ideology, opinion or perspective of a false reporter is the desire to force the police to undertake what the reporter knows will be a futile and wasteful investigation. In evidence introduced at trial on the charge of violating section 148.6, the City of El Cajon's civil counsel, who defended the city against Chaker's related civil suit, testified Chaker told him, "If all that happens in the case is that the City of El Cajon has to pay your fee of $20,000 and that prevents the City from purchasing one or two patrol cars, then that is acceptable to me." That is not a *viewpoint*. Section 148.6 is not viewpoint discriminatory.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: April 17, 2006

Respectfully submitted,

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In The Supreme Court of the United States

ALAN CROGAN, CHIEF PROBATION OFFICER, and THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioners,

v.

DARREN DAVID CHAKER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION AND CALIFORNIA PEACE OFFICERS' ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION AND CALIFORNIA PEACE OFFICERS' ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The California State Sheriffs' Association ("CSSA"), the California Police Chiefs' Association ("CPCA"), and the California Peace Officers' Association ("CPOA") respectively submit this brief as Amici Curiae in support of the Petition for Writ of Certiorari made by Petitioners Alan Crogan and the People of the State of California to this Court.[1] Amici endeavor to provide this Court with a broad law enforcement perspective as to the issues in this matter, specifically the facial constitutionality of California Penal Code Section 148.6. Amici submitted similar briefs before the California Supreme Court in its determination of the same issue in *People v. Atkinson (Stanistreet)*, 29 Cal. 4th 497, 58 P.3d 465, 127 Cal. Rptr. 2d 633 (2002), as well as before the Ninth Circuit Court of Appeals in this matter below. The parties have consented to the filing of this brief.

I. INTERESTS OF AMICI CURIAE.

CSSA represents each of the fifty-eight (58) California Sheriffs. CPCA represents virtually all of California's Municipal Chiefs of Police. CPOA represents more than

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[1] No party or counsel for a party authored this brief, in whole or in part. No person or entity other than Amici Curiae, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. This representation is made in compliance with Rule 37.6 of the United States Supreme Court Rules.

four thousand peace officers, of all ranks, throughout the State of California.

Amici frequently represent the interests of their members as Amici Curiae in both federal and state court proceedings. Their collective experience and insight into the inner administrative workings of law enforcement departments throughout the State is highly relevant to this Court's consideration of the impact of the decision below, which strikes down a prohibition against knowingly false claims of misconduct against peace officers.

In particular, Amici are interested in this case because the issues presented will have a profound impact on the members of each of the three Associations as well as every employee under the command of the State's Sheriffs and Police Chiefs. This includes the overwhelming majority of peace officers in the State of California, who are directly impacted by the decision of the Ninth Circuit.

II. SUMMARY OF ARGUMENT.

Amici will argue that certiorari review is needed in this Court in order to state the proper constitutional analysis as to California Penal Code Section 148.6,[2] namely, that it is constitutional in accord with both this Court's precedent and with the California Supreme Court's prior determination of the Section's constitutionality.

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[2] All statutory references are to the California Penal Code unless otherwise noted.

III. ARGUMENT.

As set forth in the Petition for Writ of Certiorari, there are compelling reasons for this Court's review. First, the Ninth Circuit's decision directly conflicts with relevant decisions of this Court. Second, the Ninth Circuit's decision was based on an important federal issue, namely the applicability of the First Amendment of the United States Constitution to a California Penal statute, and that decision conflicts with the California Supreme Court's determination of the very same issue.

Section 148.6 makes it a misdemeanor for anyone to file a knowingly false allegation of misconduct against a peace officer. It is this provision which is at issue in this matter and which the Ninth Circuit found to be an impermissible viewpoint-based sanction. As set forth below, the statute does not give special protection for peace officers not afforded to other public officers or members of the public, especially when Section 148.6 is considered in conjunction with other State statutory provisions. As such, Section 148.6 does not discriminate on the basis of viewpoint.

A. The Ninth Circuit's Opinion Does Not Follow this Court's Precedent in Determining that Section 148.6 is Unconstitutional.

The Ninth Circuit has analyzed Section 148.6 in a manner inconsistent with this Court's precedent, as set forth below. In analyzing Section 148.6, however, it is important first to consider its history and context.

Section 148.6 cannot be considered in a vacuum. It forms a part of a comprehensive set of statutes which address the relationship between a peace officer, his or her employing law enforcement agency, and the public. In

order to understand the context of Section 148.6, the background of the enactment of Section 148.6 must be considered, as well as the context of Section 148.6.

1. Section 148.6 Was Enacted After Section 148.5 (False Report of Felony or Misdemeanor) Was Judicially Construed Not to Apply to Complaints Against Peace Officers.

Section 148.6 was enacted to extend the protection of Section 148.5 to peace officers. This protection was only made necessary by judicial misinterpretation of the legislative intent as to Section 148.5.

Section 148.5 provides that making a knowingly false report to a peace officer or an employee of designated public agencies that a felony or misdemeanor has been committed constitutes a misdemeanor. The Court in *Pena* opined that the Legislature "did not intend citizens' complaints to a law enforcement entity concerning the conduct of that entity or its officers as envisioned under California Penal Code Section 832.5 to be within the definition of a police report for the purposes of Penal Code section 148.5." *Pena v. Municipal Court*, 96 Cal. App. 3d 77, 83, 157 Cal. Rptr. 584, 587 (1979). The Appellate Department of the Los Angeles Superior Court in *People v. Craig*, 21 Cal. App. 4th Supp. 1, 26 Cal. Rptr. 2d 184 (1993), relied heavily on *Pena* to reach a similar conclusion.

The two opinions, *supra*, obviously failed to properly interpret the Legislature's intent because the Legislature thereafter directly responded by enacting Section 148.6. The legislative history clearly establishes that the Legislature was seeking to overcome the decision in *People v.*

Craig, and its reliance on *Pena*. Significant is the fact that the Legislature did not amend Section 148.5 by expanding the definition of "reports" to include complaints made pursuant to Section 832.5. Had they done so, the amendment would have applied only to those circumstances where a crime is alleged to have occurred.

The following facts demonstrate the clear tie between Sections 832.5 and 148.6: (a) Section 148.6 was enacted as a *new* code section; (b) Section 148.6 applies only to a *knowingly false* allegation of "*misconduct*" made only against a peace officer; (c) Section 148.6 defines "allegation of misconduct against any peace officer" by specifically referencing Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code; and (d) Section 148.6 requires notice to the complainant referencing, among other things, the fact that California law requires the agency to have a procedure to investigate citizen complaints. This latter provision is obviously complimentary to Section 832.5, which is found within Chapter 4.5 of Title 3 of Part 2 of the Penal Code and mandates each department or agency that employs peace officers to establish a procedure for investigating citizen complaints against the personnel of *these* departments or agencies.

2. Section 148.6 Must Be Considered in Context With Its Companion Statutes.

In evaluating the constitutionality of a statute, a court should consider other statutes relating to the same subject, *in pari materia*. This rule applies where both statutes share the same purpose, even though they may have additional dissimilar objectives. *Walker v. Superior Court*, 47 Cal. 3d 112, 124 n.4, 763 P.2d 852, 859 n.4, 253 Cal.

Rptr. 1, 8 n.4 (1988). As the California Supreme Court has explained:

> It is a well settled rule that different statutes relating to the same subject are to be considered together. . . . When two or more statutes, whenever passed, relate to the same thing or the same class of things or to the same general subject matter, they are *in pari materia* and are to be construed as forming a unitary system and as one statute.

People v. La Barre, 193 Cal. 388, 391-92, 224 P. 750, 751-52 (1924) (internal quotations omitted). Consideration of statutes *in pari materia* is appropriate in ruling upon the constitutionality of a statute. *See, e.g.*, In re *Bacon*, 240 Cal. App. 2d 34, 55-56, 49 Cal. Rptr. 322, 334-35 (1966) (California Supreme Court rejected claim that Penal Code Section 409, failure to disperse, was unconstitutional on its face when read together with a statute *in pari materia* that lists the officers authorized to give the command to disperse), *disapproved on other grounds by* In re *Brown*, 9 Cal. 3d 612, 624, 510 P.2d 1017, 1024-25, 108 Cal. Rptr. 465, 472-73 (1973).

Section 148.6 is *in pari materia* with Section 148.5, since both share the purpose of preventing false reports to the police and the resulting diversion of police resources and unfairness to the person wrongfully accused. When the two sections are read together, it is clear that the legislative scheme is not a content or viewpoint-based restriction on speech, but is a coherent legislative scheme prohibiting false allegations that any person, peace officer or not, has committed a crime.

The statutory scheme of which Section 148.6 is a part is critical to its construction and, ultimately, its constitutionality. The Ninth Circuit illustrated the fact that Section 148.6 would punish the false complaint made by Respondent Chaker but would not punish similar false statements made by witnesses or officers during the investigation of that complaint. On that basis, the Ninth Circuit concluded that Section 148.6 unconstitutionally discriminates based upon viewpoint. Admittedly, false statements made *during an investigation* of a complaint of misconduct against a peace officer do not fall under Section 148.6, whether such statements are made by an officer, a witness, the complainant or *any other person*, and *regardless* of the "viewpoint" of such statements, i.e., in the Ninth Circuit's characterization, whether such false statements are critical *or* supportive of a peace officer.

The Ninth Circuit, however, has compared apples to oranges. The intent of Section 148.6 is to address a situation where a complaint of misconduct is filed, which necessitates the *initiation* of an investigation into that complaint. False statements in a complaint against a peace officer to a law enforcement agency initiate a *response* by that agency. § 832.5.

On the other hand, false statements made *during* an investigation would not necessitate any additional response, since an investigation would already be *ongoing*. While there may be other consequences from such false statements, like interfering, hampering, or side-tracking an investigation, the false statements do not, themselves, *cause* a law enforcement agency to deploy resources that it was not *already* using in the *already existing* investigation. The two situations are clearly not analogous. Section 148.6 focuses on a particular type of complaint, against a

peace officer, *because* such complaints are subject to the mandatory investigatory procedures of Section 832.5.

It is undeniably true that Section 148.6 only makes criminal an allegation of misconduct if the allegation is known to be false when made, is made against a peace officer and is *filed with the peace officer's employing agency*. It is also true that Section 832.5 is a statutory mandate directed solely to agencies or departments that employ peace officers and requiring that those agencies adopt procedures to investigate all citizen complaints against the agency's own personnel. Moreover, Section 148.5 applies to any false report to any peace officer regarding any felony or misdemeanor. § 148.5 (a).

Thus, if a report is of a crime and is made knowing the report to be false, it would fall within Section 148.5. Indirect and incidental beneficiaries of Section 148.5 and Section 148.6 are peace officers as well as any other member of the public who is falsely accused, but no more so than the public is the beneficiary of all laws that are enacted for the public's protection. The primary victim of the conduct proscribed by Sections 148.5 and 148.6 is the *agency* to which the false report is made and the public it serves.

Section 148.6 does not provide greater protection for one class of individuals than for another class. Allegations of misconduct are acted upon by law enforcement agencies because of the mandate of Section 832.5, a section that singles out peace officers for special scrutiny *to which other citizens are not subjected*. The diminution of a peace officer's rights and the consequent burden placed on the employing agency make Section 148.6 a necessary adjunct to Section 832.5.